

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, KOLKATA
[Before Shri A. T. Varkey, JM & Shri Manish Borad, AM]**I.T.A. No. 638/Kol/2020**
Assessment Year: 2013-14

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| Assistant Commissioner of Income-tax Central Circle-4(3), Kolkata. | Vs. | Sri Jivendra Kumar Mishra (PAN: AEXPM8503K) |
| Appellant | | Respondent |

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|-----------------------|-------------------------------|
| Date of Hearing | 24.02.2022 |
| Date of Pronouncement | 23.03.2022 |
| For the Appellant | Shri Akkal dudhwewala, FCA |
| For the Respondent | Shri Biswanath Das, Addl. CIT |

ORDER**Per Shri A. T. Varkey, JM:**

This is an appeal preferred by the assessee against the order of Ld. CIT(A), Kolkata-20 dated 13.10.2020 for AY 2013-14 passed u/s. 271AAB of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

2. The main grievance of the revenue is against the action of the Ld. CIT(A) deleting the penalty imposed u/s. 271AAB(1)(a) of the Act based on the decision of this Tribunal in M/s. Rashmi Metaliks Ltd. (ITA No. 1608/Kol/2017).

3. This appeal of revenue is time barred by three days. After hearing both the sides, we condone the delay of three days and admit the appeal for hearing.

4. Brief facts of the case are that a search and seizure action u/s. 132(1) of the Act was conducted on 18.02.2013 (AY 2013-14) which is the relevant year under consideration for this penalty appeal which was conducted on M/s. Rashmi Group and its associates. Shri Jivendra Kumar Mishra, the assessee before us in this appeal is an individual connected with this group. In the statement recorded during search u/s. 132(4) of the Act, the assessee (Shri Mishra) had admitted that he had earned *commission* income during the period between AYs

2008-09 to 2013-14. The assessee voluntarily offered a sum of Rs. 8 cr. on account of commission earned in all these years (covered by assessment u/s. 153A of the Act pursuant to search). Out of this total un-disclosed commission to the tune of Rs. 8 crores, in this AY [2013-14] the assessee had offered to pay tax on a sum of Rs.7,45,00,000/-. So, the assessee filed the return duly offering this sum (Rs.7.45 cr.) and had paid tax accordingly. Even though the AO accepted the return of income filed by the assessee pursuant to the notice u/s. 153A of the Act, thereafter, the AO levied penalty u/s. 271AAB of the Act in respect of Rs.7,45,00,000/- @ 10% which is Rs.74,50,000/- on the declared income of Rs.7,45,00,000/. Being aggrieved by the AO's action of levying penalty, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the same by relying on the decision of this Tribunal in M/s. Rashmi Metaliks, supra. Aggrieved by the aforesaid action of the Ld. CIT(A), the revenue is in appeal before us.

5. Assailing the action of the Ld. CIT(A), the Ld. DR Shri Biswanath Das appearing for the revenue contended that from a perusal of the penalty order it can be seen that the Ld. AR of the assessee has admitted that this amount (Rs.7.45 cr. commission income) was not recorded in the regular books of account due to the error on the part of his accountant. Therefore, according to the Ld. DR, the Ld. CIT(A) erred in making a finding that the declared amount (Rs.7.45 cr.) was not falling in the definition of '*undisclosed income*' for the purpose of levying penalty under section 271AAB of the Act. For that he drew our attention to the definition clause of undisclosed income given u/s. 271AAB of the Act and tried to demonstrate that since this commission amount of Rs.7.45 cr. was not recorded in the books of account of the assessee on the date of search, the said amount is an '*undisclosed income*' and, therefore, the penalty u/s. 271AAB of the Act was validly passed by the AO against the assessee and, which has been erroneously deleted by the Ld. CIT(A) which impugned action of Ld. CIT(A) may be reversed and the order of AO be restored.

6. Per contra, the Ld. AR Shri Akkal Dudhewewala countering the said contention of Ld DR, urged that during the Penalty proceedings before the AO the purported admission regarding the omission on the part of the accountant in not entering the commission income

(Rs.7.45 cr) was the alternative argument against levy of penalty u/s 271AAB of the Act which was not at all required to be considered for adjudicating the correctness of the impugned action of Ld. CIT(A) deleting the penalty. According to the Ld. AR, the defense set up by the assessee for non-levy of penalty u/s. 271AAB of the Act was that search happened on 18.02.2013 meaning it happened in the AY 2013-14 (which is the relevant assessment year under consideration), which means the assessee had time till 31.03.2013 to enter/reflect the same (commission income of Rs 7.45cr) in any documents/note books/diaries as contemplated in the definition of '*un-disclosed income*' u/s 271AAB of the Act. The Ld. AR reminded us of the fact that the assessee being an individual and is not engaged in any business actively was not required by law to maintain books as per section 44AA of the Act; and, therefore, the assessee did not maintain any books of account. Further, it was pointed out by the Ld. AR that the commission income from the transaction pertaining to it was not found by the search party during the search operation conducted on 18.02.2013. Rather, according to him, the assessee had voluntarily offered the same during search u/s. 132(4) of the Act; and consequently in this AY 2013-14 the assessee had offered to pay tax on the sum of Rs.7,45,00,000/- by filing the return and had paid tax on it. According to Ld. AR, even though the AO accepted the return of income filed by the assessee pursuant to the notice u/s. 153A of the Act, the AO has wrongly levied penalty u/s. 271AAB of the Act in respect of Rs.7,45,00,000/- @ 10% which is Rs.74,50,000/-. On appeal, according to Ld. AR, the Ld. CIT(A) rightly deleted the same by relying on the decision of this Tribunal in the very same group case of M/s. Rashmi Metaliks (supra), which does not require any interference from our side.

7. We have heard rival submissions and gone through the facts and circumstances of the case. We find the search took place on 18.02.2013 meaning it happened in this relevant AY i.e. AY 2013-14. There is no dispute that assessee is an individual who is not doing any business. So, he is not required by law to maintain the books of account in contrast to person who are required to maintain as per section 44AA and required to get audited their account as per section 44AB of the Act. In such a backdrop we need to appreciate the contention of Ld. AR of the assessee that the income which he offered u/s. 132(4) of the Act

during the search on 18.02.2013 to the tune of Rs.7.45 cr., even otherwise could have been shown by the assessee in his return of income because the assessee had enough time to do so till 31.03.2013 (*the relevant assessment year being AY 2013-14 means he has time till 31.03.2013 to enter/offer as regular income Rs.7.45 cr.*) In other words, the assessee's defense is that even if there was no search conducted on him on February 18, 2013, the assessee had enough time to offer this amount (Rs.7.45 cr.) legally till 31.03.2013. Therefore, according to assessee, this amount cannot be termed as '*undisclosed income*' as per the definition given in section 271AAB of the Act. So, according to Ld. AR, the assessee's offer of Rs.7.45 cr. during search dated 18.02.2013 would not fall in the ken of the definition given in sec. 271AAB of the Act. For appreciating this contention one has to look into the definition of "*undisclosed Income*" given in section 271AAB of the Act, which reads as under:

“(c) "*undisclosed income*" means—

(i) *any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—*

(A) *not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or*

(B) *otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of search; or*

(ii) *any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.”*

(emphasis given)

8. From a bare reading of the definition of '*undisclosed income*' it is noted that in order to be qualified as an '*undisclosed income*', there should be something which is described therein [*as per the definition given under sub clause (i) of clause (c) of section 271AAB of the Act*] which was found in the course of search which has not been recorded in the books of account or other documents maintained in the normal course of

business. In other words, during search if any income of the specified year represented by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions was found in the course of a search, which has (A) *not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or (B) otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of search; then it would qualify as 'undisclosed income'* for the purpose of section 271AAB of the Act.[Please note that for this case, sub clause (ii) supra is not relevant because it is regarding claim of false expenses, so not discussed]. So from the definition given, it can be seen that those items stated in sub clause (i) if found by the search party which has not been found recorded in the books of account or other documents of the assessee, it will qualify as "*undisclosed Income*" otherwise it cannot be called as "*undisclosed income*" for the purpose of levy of penalty u/s. 271AAB of the Act. Coming to the instant case, the assessee's case is that being an individual he is not required as per law to maintain books of account. However, it is elementary in such cases that the assessee in the normal course writes/notes down the income/expenditure which accrues to him in his diary/note book etc which could be treated 'as books/other documents' for the purpose of computation of income of such persons. So, now it has to be seen whether the commission income which the assessee had offered u/s. 132(4) of the Act was discovered by the search party on 18.02.2013 i.e. whether the information regarding commission income of Rs.7.45 cr. was discovered from any diary/note book found during search. Answer to this is that no such material was discovered by the search team other than the admission made by the assessee of this commission income to the tune of Rs.7.45 cr. In this regard, we note that it is not the case of AO that the transaction in respect of which the assessee had offered the *commission income* had been discovered during search. Taking into consideration, the aforesaid facts, and since search took place on 18.02.2013, the assessee had time till 31.03.2013 to enter the same (commission income of Rs.7.45 cr.) in 'other document' as contemplated under definition of un-disclosed income (supra). Therefore, in the absence of any discovery/seizure of any material during search which un-raveled the purported undisclosed commission income (Rs.7.45 cr.) and since the assessee as per law need not maintain books of account and since the assessee had time (more than 40 days till 31.03.2013) the said offer of assessee cannot be termed as '*undisclosed income*' as per the definition discussed supra. So, we find that this commission income which the assessee offered u/s. 132(4) of the Act for AY

2013-14 does not fall in the ken of undisclosed income for the purpose of levy of penalty under section 271AAB of the Act. So since the assessee's disclosure does not fall in the definition of undisclosed income in sub clause (i) to clause (c) of section 271AAB of the Act, the penalty u/s. 271AAB of the Act cannot be legally sustained in the facts of this case as rightly held by the Ld. CIT(A) by relying on the decision of this Tribunal in M/s. Rashmi Metaliks. So, we adopt the other reasons stated therein in the case of M/s. Rashmi Metaliks *mutatis mutandis* in addition to the reason given (supra) by us to uphold the impugned order of the Ld. CIT(A). Therefore, we do not wish to interfere in the impugned order of the Ld. CIT(A). So, we sustain it.

9. In the result, the appeal of the revenue is dismissed.

Order is pronounced in the open court on 23rd March, 2022.

Sd/-

(Manish Borad)
Accountant Member

Sd/-

(Aby. T. Varkey)
Judicial Member

Dated : 23rd March, 2022

JD(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – ACIT, C.C-4(3), Kolkata.
2. Respondent – Shri Jivendra Kr. Mishra, 85, N. S. Road, Burra Bazar, Kolkata-700 001.
3. CIT(A), Kolkata-20. (sent through e-mal)
4. PCIT , Kolkata
5. DR, ITAT, Kolkata. (sent through e-mal)

/True Copy,

By order,

Assistant Registrar